In the United States Circuit Court of Appeals for the Ninth District.

SADIE COTTER,
Plaintiff in Error,

vs.

FRANK J. COTTER,
Defendant in Error.

No. 2532

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION.

BRIEF FOR DEFENDANT IN ERROR

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STATEMENT OF THE CASE.

Plaintiff's action is brought upon a decree rendered in the Superior Court, State of Washington, for the County of King, May 14, 1913, in favor of plaintiff, appellant herein, and against the defendant, appellee herein, in an action for divorce wherein both parties appeared.

The material parts of the complaint are as follows:

I.

"That at all times hereinafter mentioned the Superior Court, of the State of Washington, for the

County of King, was a court of general jurisdiction over matters in equity and law, duly created and organized by the laws of that State."

III.

"That thereafter, and on the 14th day of May, 1913, such proceedings were had in said court and cause whereby a decree was duly given, made, entered, enrolled and docketed in said court in favor of the plaintiff, dissolving the bonds of matrimony which existed between the plaintiff and defendant."

IV.

"That said decree further provided and ordered that the defendant pay to the plaintiff, as permanent alimony, the sum of Fifty Dollars ($50.00) per month, the same to be paid on the 1st day of each and every month from the date of the entry of said decree."

V.

"That said decree further provided that the defendant should pay certain outstanding indebtedness incurred by the plaintiff in the sum of Seven Hundred Fifty Dollars; that no part of same has been paid except the sum of One Hundred Twenty Dollars ($120.00), and there is now due and owing from the defendant to the plaintiff the sum of Six Hundred Thirty Dollars ($630.00), together with interest thereon at the rate of eight per cent (8) per annum from date until paid."

IX.

"That said Superior Court for King County, in the State of Washington, is duly empowered and authorized under the laws of said State to grant permanent alimony, as provided by said decree,—a copy of the Statutes of the State of Washington relative thereto being as follows, and hereby made a part of this complaint:"

> "In granting a divorce, the Court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the relative merits of the parties and to the condition in which they shall be left by such divorce, and to the burdens imposed upon it for the beniflt of the children, and shall make provision for the guardianship, custody, support and education of the children of such minor marriage." (minor children of such marriage.)

To the complaint the defendant demurred upon three grounds:

I.

That the court has no jurisdiction of the subject matter of the action.

II.

That the plaintiff has no legal capacity to sue.

III.

That plaintiff's complaint does not state facts suf-

ficient to constitute a cause of action against this defendant.

ARGUMENT.

It does not appear from said complaint that the Superior Court, State of Washington, for the County of King, has jurisdiction over cause of divorce, and although alleging said court to have general jurisdiction of actions of law and equity, it is not sufficient to show that said court had jurisdiction of the subject matter of this action. The jurisdiction of marraige and divorce in this country is purely statutory:

Rumping v. Rumping, Mont., 91 Pac. 1057, 12 L. R. A. (N. S.) 1200

wherein the Court says: "It is elementary, of course, that neither courts of law nor equity have any inherent power to dissolve marriage. The power to decree divorce is purely statutory. Irwin v. Irwin 3 Okla. 186, 41 Pac. 369."

"No American tribunal has jurisdiction of divorce except by statute." Sharon v. Sharon, 67 Calif. 206.

The presumption of jurisdiction in favor of a court of general jurisdiction does not apply when the court acts in a special capacity and not in accordance with common law.

In Commonwealth v. Blood, 97 Mass. 538, 13 Ency. Law, page 997, the court said: "The paper offered as a record was not admissible. There is no proof that the court in California had jurisdication of the

cause or the parties. Although a court of record, its jurisdiction over the subject of divorce is special authority not recognized by common law, and its proceedings in relation to it stand on the same footing with those of courts of limited and inferior jurisdiction; so that its powers in the case must be shown and appear to have been strictly pursued."

In Galpin v. Page, 18 Wall. U. S. 350, 365, 21 L. ed. 962, Justice Field says:

"It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly.*** This presumption embraces jurisdiction not only of the cause or subject matter of the action in which the judgment is given, but of the parties also.***The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record or their judgments will be deemed void on their face."

The court further said: quoting from Morse v. Presby 5 Fost. N. H. 302.

"A court of general jurisdiction may have special and summary powers, wholly derived from statutes, not exercised according to the course of common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited

and special jurisdiction. The jurisdiction in such cases, both as to the subject matter of the judgment, and as to the persons to be affected by it, must appear by the record; and every thing will be presumed to be without the jurisdiction which does not distinctly appear to be within it." The court further said:

"Where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class of cases not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear upon the record."

In Northcut v. Lemery, 8 Ore. 317 et seq. the court said:

"There is another reason why the decree made in the divorce suit cannot be upheld. The court which rendered it, although one of general jurisdiction, was then exercising a special power conferred upon it by statute, and not accordng to the course of common law. And in such cases, even a court of general jurisdiction must strictly comply with the requirements of the statute in its proceedings, and this comliance must affirmatively appear from the record itself; and unless it does so appear, no presumption will be indulged to sustain the validity of its judgments or decrees." Affirmed in Furgeson v. Jones, 17 Ore. 204. See, also, Dick v. Wilson, 10 Ore. 490.

In Kelley v. Kelley,—Mass.—25 L. R. A. 806.

The court in passing upon the question of the jurisdiction of marriage and divorce, held that courts of general jurisdiction of law or equity had no inherent jurisdiction to grant divorce and alimony without statutory authority, that the jurisdiction of the court of chancery of this state in actions for divorce, either on the ground of nullity or for any cause arising subsequent to marriage, is founded wholly upon the statutes.

In Erkenbrach v. Erkenbrach, 96 N. Y. 456, the court said:

"The courts in this state have no common-law jurisdiction over the subject of divorce, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute."

In Simmons v. Saul, 138 U. S. 513,34 L. ed. 1054, the court said:

"It is the settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter or the parties affected by it, nor into the facts necessary to give such jurisdiction." Citing Thompson v. Whitman, 85 U. S. 18 Wall. 457, 21 L. ed. 897; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538.

The only allegation in plaintiff's complaint tending to show jurisdiction of the subject matter by the Superior Court, State of Washington, for the County of King, is found in paragraph IX. of plaintiff's complaint, supra, and the statute claimed to grant such authority is purported to be quoted. Said quoted section does not show authority of said Superior Court to grant divorce or alimony. Said law does not authorize any court to grant alimony, but provides only for such division or disposition of the property of parties as shall appear just and equitable. There is nothing in the complaint to show that any property was considered by the court in said action. The judgment only provides for the permanent dissolution of the marriage, and then the court further decrees that the defendant pay to the plaintiff, as permanent alimony, the sum of Fifty Dollars per month, the same to be paid on the 1st day of each and every month from the date of the entry of said decree. And also further decrees that the defendant shall pay certain outstanding indebtedness incurred by the plaintiff. There is no judgment for a certain sum of money, or for costs against the defendant. It is not such a judgment or decree upon which execution could be issued, and had the court authority to make such a judgment and decree, execution could not be issued thereon without a further order of the court for over-due instalments of alimony, nor could execution issue to enforce payment of certain sums of money to individuals not party to the suit. Such a decree being wholly within the power of the

court granting it to be enforced by subsequent orders.

In Hunt v. Monroe,—Utah,—91 Pac. 269, 11 L. R. A. (N. S.) 253, the court in discussing the same proposition, stated:

"But the fact that a sum is not specificially fixed as due from one to the other of the parties to the original suit, and certain sums are to become due in the future and payable in instalments or otherwise, does defeat the right of action, unless the amount due is ascertained and fixed by some appropriate proceeding before the action on the judgment or order or decree is commenced." Approved in Wells v. Wells, 209 Mass. 282, 35 L. R. A. (N. S.) 561.

In Barclay v. Barclay, 184 Ill. 375, 51 L. R. A. 351, the court said:

"The liability to pay alimony is not founded upon a contract, but is a penalty imposed for failure to perform a duty.***The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree."

Appellants rely mainly upon the case of Barber v. Barber, 21 How. 582, 16 L. ed. 226, rendered by a divided court, three judges dissenting, and Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905. 28 L. R. A. (N. S.) 1068.

Barber v. Barber was upon judgement rendered in the State of New York. The judgment rendered therein for future payments of the instalments was by the decree made permanent, and that such future payments should bear interest as they became due, and that execution might issue therefor *toties quoties*, thus becoming a fixed sum due and payable without order of court or further proceeding required, other than the issuance of an execution.

In Sistare v. Sistare, a decree for future payments of alimony, it was decreed that the plaintiff have leave to apply from time to time at the foot of the judgment as may be necessary to enforce the decree. No question was raised in this case that no such order had been issued prior to instituting the suit upon the New York judgment in the state of Connecticut.

Such judgments under the law of New York, as determined by the Supreme Court, are fixed and final and not subject to change or modification, and the decision of the Supreme Court of the United States was based upon the construction of the New York Statute by the New York courts. The Supreme Court of the United States follows the decisions of the several state courts in their construction of their statutes where no constitutional question arises.

Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810 was an action brought in the State of New York upon a de-

cree from the Chancery court of New Jersey, in which the Supreme Court of the United States sustained the judgment of the Chancery Court of New Jersey and the appellate court of New York for the sum found due upon the date of the New Jersey decree. It appears clearly from the record that no final order or judgement had been entered in the New Jersey court for any of the instalments of alimony due or to become due after the time of entering the New Jersey decree.

It is apparent from these decisions and the authorities cited in their support, that before a judgment of a court of one state or territory can be sued on in a sister State under the full faith and credit clause of the Constitution of the United States, the orginal judgment must be one for a definite sum of money enforceable by execution without further order or decree, and this would appear to be the case whether the order or decree was final or subject to modification.

The Supreme Court of the United States in the case of Sistare v. Sistare based its opinion upon the contsruction of the law of New York by the New York courts in holdng that a judgment for past due instalments of alimony, under the laws of New York, was final judgment fixed and determined by the court and not subject to change or modification, thus distinguishing the case from that of Lynde v. Lynde wherein it was held that a decree for future payment of alimony rendered by the court of chanc-

ery of New Jersey was not a final judgment. The court in the Lynde case said:

"The decree of the court of chancery of New Jersey, on which the suit is brought, provides, first, for the payment of $7,840 for alimony already due, and $1,000 counsel fee; second, for the payment of alimony since the date of the decree at the rate of $80 per week;"***

"The decree for the payment of $8,840 was a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the court of chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum."

The Lynde case was followed in Israel v. Isreal, 148 Fed. Rep. 576, 9 L. R. A. (N. S.) 1168, and in Hunt v. Monroe, 11 L. R. A. (N. S.) 249.

Where the statutes and decisions in the foreign state are not clear and decisive on the question involved in this case, the rule laid down in the following case is undoubtedly the law that should govern.

Alexander v. Alexander, 13 App. D. C. 334, 45 L. R. A. 806, is a learned and elaborate discussion of the law of divorce and alimony.

In this case a decree of the court of the District of Columbia granted a divorce, and awarded to the divorced wife $50.00 a month alimony payable by the defendant to the plaintiff after the date of the

decree. On various applications, under the decree, for an increase and decrease of alimony a judgment was rendered directing the defendant to pay $25.00 a month for a certain period, and $30.00 a month thereafter. The plaintiff then filed a bill of review praying cancellaton of the orders of the court modifying alimony in the original decree and that the original allowance of $50.00 a month be renewed.

The statute upon which the orginal decree was rendered is based upon the following section, which provides that, "in all cases where a divorce is granted, the court allowing the same shall have power, if it see fit, to award alimony to the wife, and to retain her right of dower." The court said:

"Now, what were the usuages and customs, and what was the jurisdiction of the ecclesiastical courts, and of the courts of chancery in the matter of alimony at and before the time of the passage of the act of Congress of 1860? Beyond all question, the jurisdiction of these courts was not exhausted by the rendition of the original decree. The decree for a seperation was final; the adjudication that alimony to some extent was payable may have been final; but it was never contended or maintained that the amount of alimony then fixed was absolutely final and conclusive for all time, and could not afterwards be modified; on the contrary, the authorities appear to be unanimous to the effect that the adjudication was a continuing one, and that the courts retained the whole subject under their control, increasing or diminishing the amount of alimony from time to

time, as might seem just under changed or changing circumstances; and this without reference to the fact that the original decree might have been entirely silent in regard to the reservation of the right of the parties, or either of them, thereafter to apply to the court for modification."

The statutes of the State of Washington do not provide for permanent alimony. The only provision made is for a division of property. If any right exists in the court of Washington to grant permanent alimony it is by virtue of the right of the wife to maintenance and support and such decree must be by virtue of statute, as declared in the case of Alexander v. Alexander, and is not a final judgment, but one subject to modification and change by the court which granted it, according to the conditions of the parties. A dilligent search of the decisions of the courts of the State of Washington fails to disclose any authority direct in point.

State v. Cave, 26 Wash. 213, is a habeas corpus action to release the defendant from arrest under contempt proceedings, for failure to pay alimony granted under decree of divorce. The question was raised as to the authority of the court in divorce proceedings to grant permanent alimony. The court said:

"While no express authority is found in the statutes of this state for permanent alimony *eo nomie* after divorce," then cites the section of the Washington statute set out in the complaint herein, and fur-

ther says: "The court is here unrestrained as to the provision to be made for the maintenance of the minor children. The circumstances of each case alone determine what provision should be made for such children."

In the case at bar there are no minor children, and the conclusion must be reached that the law does not authorize the court to grant permanent alimony to the wife. The court further said: (State v. Cave, supra.)

"Where the statute is silent as to the remedy, the court has inherent power to enforce its judgments or decrees and orders according to its equity powers. The silence of the statue in this respect does not take away any of the power lodged in the court by its equity jurisdiction. In this state no rule is provided by statute for the enforcement of such decrees, but the rule of attachment has been generally followed in the practice and approved by this court."

In Smith v. Smith, 17 Wash. 430, where the plaintiff was allowed by final decree $25 per month as alimony and for the support of said children, the court said:

"It is the duty of the courts to enforce their orders, and when it comes to their knowledge that such orders are not obeyed they should require and enforce such obedience by punishment for contempt."

King v. Miller, 10 Wash. 274, was an action

brought by Hannah A. King, the divorced wife of James B. King, to obtain relief with reference to alimony allowed her by the decree of divorce previously granted. In the action for divorce the court awarded the custody of the children to the plaintiff, and provided that defendant should pay her $50.00 per month for the maintenance of herself and children, and provided that the payment of such sums should be secured by a lien upon certain real estate. After default in the payment, the plaintiff applied to have said allowance consolidated in a gross sum at its present value, and to have the lien therefor upon the real estate foreclosed. Upon the trial the court rendered a decree establishing the mortgage claim as a prior lien upon a portion of the property, and decreed that the alimony previously allowed should be modified and reduced to a gross sum of $2,500. and that the property upon which the lien had been created should be sold to satisfy the same, from which decree the defendant appealed. On appeal the supreme court sustained the decree as modified, and evaded the issue upon the question of granting permanent alimony, and said:

"Nothwithstanding the fact that a decree of divorce should conclude property rights so far as the husband and wife are concerned, the court thereafter might entertain a proceeding brought to obtain an allowance or provision for the support of minor children."

From the laws of Washington and from the decisions of the State, it must appear that a decree of

the Court of the State of Washington granting future alimony, or division of property, is at all times subject to modification by the court granting the decree, and the only method of enforcing said decree is by proceedings in contempt.

The authorities cited by appellant and based upon the decisions in the Sistare v. Sistare and Barber v. Barber cases are not in point under the laws of the State of Washington. The decision in the case of Lynde v. Lynde clearly states the law in this case.

From the laws and decisions of the State of Washington, giving the utmost latitude to the statute, the plaintiff under the decree could have no other right to enforce the same, except by contempt proceedings, and no proceeding could be had under execution until plaintiff had secured an order of the court granting the decree and entering judgment for the amount of alimony due and unpaid, and no action in a sister state could be brought upon the decreee for future payment of alimony until final judgment for the amount in arrears due and unpaid had been rendered in the court having original jurisdiction.

As to that part of the decree for the payment of certain sums of indebtedness, contracted by plaintiff, to persons not parties to the action, no right of action would accrue to the plaintiff, under any construction of the case, until she had shown that she had paid the same.

In Wells v. Wells, 209 Mass. 282, 35 L. R. A. (N. S.) 561. The court held that an order for future

payments of alimony, as a provision for future support, being ordinarily liable to modification at any time, is subject to the control of the court which made the order, and so is not a final order for the payment of a fixed sum.

"Judgments of State Courts are not entitled, under United States constitution, to any higher or other effect in sister states than that which may be claimed for them in the state where rendered, according to her statutes and procedure." Suydam v. Barber 18 N. Y. 469, 75 Am. D. 254. Cited and approved in Union & Planters Bank of Memphis v. City of Memphis, 111, Fed. Rep. 561, and in Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. ed. 687.

In Barclay v. Barclay, Supra, the court said:

"The liability to pay alimony is not founded upon a contract, but is a penalty imposed for failure to perform a duty.***The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is arrears in payments required under the decree."

In re Nowell, 99 Fed., 931, was an action to enjoin the wife from collecting alimony by reason of the defendant's discharge in bankruptcy. In determining the question the court held:

"According to the decision and the existing statutes, alimony appears now to be an allowance made

by the decree of a competent court for the benefit of a wife. In a sense, this decree fixes the amount to be paid during the joint lives of husband and wife; but not only is the decree always open to modification in respect of future alimony by reason of a change in the situation of husband or wife, but also, if the wife seeks legal process to collect the arrears which have not been paid to her according to the decree, that process will not issue as a right or without notice to the husband. Upon order of notice to the husband to show cause why process should not issue, he may, without modification of the original decree, move that the amount to be collected by the process be reduced, by reason of a change in his circumstances or in those of his wife. The process granted may be execution, scire facies, or an attachment for contempt."

In Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, it was held that neither the alimony in arrears at the time of the adjudication in bankruptcy, nor alimony accruing since that adjudication, was provable in bankruptcy or barred by the discharge. That it was not unconditional and unchangeable, that it might be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction.

Prior to the Act of Congress, Feb. 5, 1903, amending Act of July 1, 1898, no provision existed in the Bankruptcy Act designating alimony as a debt not provable in bankruptcy. The decisions were based

upon the construction that decrees for future payment of alimony were subject to modification by the courts granting them, and were not decrees for a fixed and determined debt.

In Van Horn v. Van Horn, 48 Wash. 389, (quoting from Syllabus.)

"An action does not lie in this state to recover temporary alimony upon an order therefor made in an action for divorce in another state, although appealable as a final order under the laws of such state; since it is subject at all times to modification in the foreign court."

The court in this case has no jurisdiction under the full faith and credit clause of the constitution.

The decisions of several courts following either the decision of the Barber case, or the Lynde case, or Sistare case seem in some instances not to note the true distinction between judgments that are entitled to be enforced under the full faith and credit clause, and those that are not so entitled. It would appear that a judgment to be entitled to the full faith and credit clause in a sister state must be such a judgment as could be enforced by an execution in the state where it was rendered without further proceedings being had in the case, and such a judgment as is recognized by the decision of the state which rendered it as one that is final and unchangeable by the court rendering it.

The decisions of the state courts construing their statutes, and the judgments rendered there-

under must determine the law governing the sister state in an action brought under the full faith and credit clause of the constitution of the United States.

In Shelby et. al. v. Guy, 11 Wheaton, 361, 6 L. ed. 496, the court said:

"That the statute law of the states must furnish the rule of decision to this court, as far as they comport with the constitution of the United States in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction."

(Owing to the fact that no brief on behalf of plaintiff in error has been served on defendant in error, it is impossible to directly answer the arguments that appellant may make. Under rule 24 sufficient time is not given to prepare and file a reply brief after the last day given appellant to serve the opening brief.)

From plaintiff's complaint and the foregoing decisions it must appear.

I.

That plaintiff's complaint does not show that the court granting the decree in the State of Washington, was a court having jurisdiction of divorce and alimony.

II.

That if the court holds that it takes judicial notice of the jurisdiction of the courts of the different states, than it must appear that under the statutes of the State of Washington there is no authority for granting permanent alimony.

III.

That if the courts of the State of Washington are authorized indirectly to provide for future alimony in divorce proceedings, then such decrees are not final and are always subject to enforcement and modification by the courts granting alimony, and such decrees cannot be enforced in a sister state or territory under the full faith and credit clause of the Constitution of the United States.

IV.

That defendant's demurrer is fully sustained by the law and the decisions of the courts.

For the reasons stated in the foregoing argument we maintain that the judgment of the District court for the Territory of Alaska sustaining defendant's demurrer to plaintiff's complaint was properly made and entered, and we, therefore, submit that an order should be entered sustaining the judgment of said court.

Respectfully submitted,

S. O. MORFORD,

Council for Defendant in Error.